

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re the Matter of:) GC Docket No. 02-278
)
Petition of AZCOMP Technologies, Inc. for) GC Docket No. 05-338
Retroactive Waiver of 47 C.F.R.)
§ 64.1200(a)(4)(iv))
_____)

PETITION OF AZCOMP TECHNOLOGIES, INC. FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3, and Paragraph 30 of the Commission's Order, CG Docket Nos. 02-278 and 05-338, FCC 14-164 (rel. Oct. 30, 2014) (the "Order"), AZCOMP Technologies, Inc. ("AZCOMP") respectfully requests that the Commission grant it a retroactive waiver from complying with 47 C.F.R. § 64.1200(a)(4)(iv) (the "Regulation"), with respect to any faxes that AZCOMP transmitted prior to the date of this Petition with the prior express consent of the recipients or their agents, but without the precise, Regulation-required opt-out language.

On October 30, 2014, the Commission released FCC Order 14-164 (the "Order"). In doing so, the Commission granted a retroactive waiver from complying with the Regulation to a group of petitioners who were facing lawsuits that alleged, in part, that the petitioners had violated the Regulation by failing to include specific opt-out language in their faxes, even when those faxes were sent with the recipients' prior express invitation or permission. Based upon the confusion surrounding the Regulation, the Commission determined that good cause supported the issuance of a retroactive waiver, and that granting such a waiver was in the public interest. The Commission also invited other similarly situated entities (like AZCOMP) to seek retroactive waivers from complying with the Regulation.¹ This Petition seeks that very same relief.

¹ See *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014), ¶¶ 26-28.

1 This matter involves a small company (AZCOMP) who sent a fax to an existing
2 customer in September of 2014, which the customer acted upon by buying the software
3 update discussed in the fax. In what could be viewed as a sad comment on our legal system,
4 AZCOMP is now being sued by that customer - not because the software was bad, or
5 because the service was poor, or because the price was too high, or because the training that
6 they received was deficient, but rather, because the fax did not contain the specific opt-out
7 language required by the Regulation.

8 As a result, AZCOMP now finds itself similarly situated to those petitioners who
9 received a retroactive waiver by virtue of the Order, because it is facing a putative class
10 action lawsuit on the basis that it sent a fax, in violation of the Telephone Consumer
11 Protection Act ("TCPA"), during the relevant time period, which failed to include an
12 appropriate opt-out notice. Because the TCPA was not intended to apply to situations like
13 this, because companies like AZCOMP should not be punished for being uncertain about
14 what should and should not be included in facsimile communications to existing customers
15 due to the mass confusion over that rule, and because public interest would be harmed by
16 requiring a small business like AZCOMP to expend substantial capital and human resources
17 defending an unnecessary (and likely fatal) class action lawsuit because of confusion over
18 the Commission's regulations, a waiver is appropriate here.

19 In its Order, the Commission requested that petitioners like AZCOMP make "every
20 effort" to pursue a retroactive waiver on or prior to April 30, 2015.² Here, AZCOMP was
21 not served with the summons and complaint in the purported class action until mid-
22 November, 2015. Until that moment, and until it consulted with counsel regarding the class
23 action, AZCOMP, a small software reseller company confused by the changing rules
24 governing the transmission of faxes to existing customers, had no idea that an opportunity
25 existed to seek a retroactive waiver. Once it learned of that opportunity, AZCOMP wasted
26 no time in filing this Petition - less than two (2) weeks after accepting service of the
27 complaint, before making an appearance in the case, before filing a responsive pleading to

28 ² See Order, ¶ 2.

1 the putative class action complaint, and before conducting any discovery or otherwise
2 investigating the plaintiff's allegations.

3 **I. BACKGROUND**

4 AZCOMP is a small company located in Gilbert, Arizona. AZCOMP sells medical
5 practice management, medical billing and electronic medical records system software, and
6 provides training and support regarding that software to its customers, both locally and
7 remotely via the Internet and via telephone. Many of AZCOMP's customers are medical and
8 dental offices, who prefer to send and receive communications by fax, and who direct
9 AZCOMP to communicate with them by fax. On September 15, 2014, 45 days before the
10 Order went into effect, AZCOMP sent a one-page fax (the "9/15/14 Fax") to Perry
11 Chiropractic ("Perry"), an Ohio-based chiropractic office, with whom AZCOMP had a pre-
12 existing business relationship³, and with whom AZCOMP had been instructed to
13 communicate by fax. The 9/14/15 Fax provided Perry with information regarding a medical
14 office management software update, and advised Perry of the deadline for receiving a
15 discount if it purchased that update. (See Exhibit A to Exhibit 1 attached hereto.)

16 **A. Pending Litigation Against AZCOMP**

17 On November 4, 2015, Perry filed a "Class Action Complaint" against AZCOMP,
18 styled *Perry Chiropractic & Therapy Center of Canton, LLC v. AZCOMP Technologies, Inc.*
19 *and John Does 1-10*, Case No. 5:15-cv-2273 (United States District Court for the Northern
20 District of Ohio) (the "Lawsuit"). On November 13, 2015, Perry filed a "First Amended
21 Class Action Complaint" (the "Complaint"). (A copy of the Complaint is attached as
22 Exhibit 1.) The Lawsuit was filed by serial TCPA litigators Montgomery, Rennie & Jonson,
23 who have filed dozens (if not hundreds) of junk fax lawsuits throughout the country.

24 The Complaint alleges, among other things, that the 9/15/14 Fax was an "unsolicited
25 advertisement" that did not include the precise opt-out notice required by the Regulation.⁴

26
27 ³ Perry purchased software and received training from AZCOMP in July of 2014, two months before the fax was sent.
28 Perry also purchased software and received training from AZCOMP in January of 2015, four months after the fax was sent. Ironically (or perhaps not), Perry purchased the very same software update that was discussed in the 9/15/14 fax.

⁴ See Ex. 1, ¶ 16.

1 While AZCOMP disputes that the 9/15/14 Fax was unsolicited, or that it constituted an
2 “advertisement” within the meaning of the TCPA,⁵ AZCOMP is not asking this Commission
3 to resolve those disputes. Nor could it.⁶ Instead, AZCOMP is requesting, in the interest of
4 justice and fairness, that the Commission grant a retroactive waiver in its favor on the issue
5 of the opt-out language – the very same waiver that the Commission granted to the
6 petitioners in the Order and subsequently invited companies like AZCOMP to seek.

7 **B. The Current Statutory and Regulatory Framework**

8 The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax
9 Prevention Act of 2005 (“JFPA”),⁷ prohibits, under certain circumstances, the use of a fax
10 machine to send an “unsolicited advertisement.”⁸ An “unsolicited advertisement” is defined
11 as “any material advertising the commercial availability or quality of any property, goods, or
12 services which is transmitted to any person without that person’s prior express invitation or
13 permission.”⁹

14 The Regulation states that fax advertisements “sent to a recipient that has provided
15 prior express invitation or permission to the sender must include an opt-out notice.”¹⁰ In
16 addition to the Regulation, the Commission also adopted rules implementing the JFPA.¹¹ As
17 is explained in the Order, a footnote in the rules led to industry-wide confusion regarding the
18 Commission’s intent to apply the opt-out notice to solicited faxes.¹² In addition, the
19 Commission acknowledged that its notice of proposed rulemaking was unclear regarding the

20 ⁵ AZCOMP does not, in this Petition, waive any defenses that it may assert in the Lawsuit to Perry’s claims. To the
21 contrary: while AZCOMP is filing this Petition at the earliest opportunity, for the convenience of the Commission, many
22 key issues remain pending and have yet to be litigated in the District Court, including but not limited to whether the fax
23 at issue were solicited by Perry or others, and whether it constitutes an “advertisement” within the meaning of the TCPA.

⁶ AZCOMP recognizes that a waiver should not “be construed in any way to confirm or deny whether the petitioners, in
fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” *See*
Order, ¶ 31.

⁷ *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax
Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C.
§ 227 *et seq.*

⁸ 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

⁹ *Id.* § 227(a)(5).

¹⁰ *See* 47 C.F.R. § 64.1200(a)(4)(iv); *see also* Rules and Regulations Implementing the Telephone Consumer Protection
Act of 1991, *Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd at
3812, para. 48 (2006) (the “Junk Fax Order”).

¹¹ *See* Junk Fax Order.

¹² *See* Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n.154 (“We note that the opt-out notice requirement only applies to
communications that constitute *unsolicited* advertisements.” (emphasis added))

1 opt-out requirement on fax ads sent with the prior express permission of the recipient, which
2 also created confusion.

3 In its Order, the Commission “confirm[ed] that senders of fax ads must include
4 certain information on the fax that will allow consumers to opt out, even if they previously
5 agreed to receive fax ads from such senders.”¹³ Due to the aforementioned widespread
6 confusion, however, the Commission decided to grant retroactive waivers to parties who
7 were affected by that confusion. As explained by the Commission:

8 [W]e recognize that some parties who have sent fax ads with the
9 recipient’s prior express permission may have reasonably been
10 uncertain about whether our requirement for opt-out notices applied
11 to them. As such, we grant retroactive waivers of our opt-out
12 requirement to certain fax advertisement senders to provide these
parties with temporary relief from any past obligation to provide the
opt-out notice to such recipients required by our rules.

13 * * *

14 [W]e believe the public interest is better served by granting such a
15 limited retroactive waiver than through strict application of the rule.¹⁴

16 Recognizing that there were undoubtedly other parties, like AZCOMP, who were
17 similarly situated to the petitioners, the Commission offered those parties the very same
18 opportunity to seek a retroactive waiver, so long as those parties made “every effort” to file
19 their waiver requests by April 30, 2015.¹⁵

20 **II. THE COMMISSION SHOULD GRANT A LIMITED RETROACTIVE**
21 **WAIVER OF THE REGULATION FOR ANY SOLICITED FAX SENT BY OR**
ON BEHALF OF AZCOMP

22 There is no question that AZCOMP is similarly situated to those petitioners who
23 received waivers pursuant to the Order. As stated above, AZCOMP has been sued by an
24 existing customer who requested that AZCOMP communicate with it by facsimile, and who
25 specifically requested that AZCOMP provide it with updates regarding its medical office

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27 ¹³ See Order, ¶ 1.

28 ¹⁴ See Order, ¶¶ 1, 22.

¹⁵ See Order, ¶ 30.

1 management software – an update the customer subsequently acted upon by purchasing a
2 newer version of the software. AZCOMP was not sued because its 9/15/14 Fax to the
3 customer had no opt-out language, but rather, because it did have opt-out language which did
4 not precisely track the language required by the Regulation.

5 Under such circumstances, a waiver is appropriate. Section 1.3 of the Commission’s
6 rules permits the Commission to grant a waiver if good cause is shown.¹⁶ Generally, the
7 Commission may grant a waiver if it would not undermine the policy objective of the
8 pertinent rule to do so, and if it would otherwise serve the public interest to do so.¹⁷ Further,
9 a waiver is appropriate where, as here, special circumstances warrant a deviation from the
10 general rule, and where the public interest would be better served by deviating from the rule
11 as opposed to strictly adhering to it.¹⁸

12 In AZCOMP’s case, special circumstances favor a deviation from the general rule.
13 As the Order itself acknowledges, good cause has been established for granting retroactive
14 waivers due to the inconsistent footnote in the Junk Fax Order, which indicated that the
15 opt-out notice requirement applied only to unsolicited advertisements.¹⁹ The Commission
16 conceded that this language could reasonably be read to mean that a company like AZCOMP
17 need not include an opt-out notice when sending solicited faxes to existing customers.²⁰ In
18 addition, the Commission’s notice of proposed rulemaking also failed to provide explicit
19 notice that the Commission was planning to require the opt-out notice for solicited faxes.²¹
20 The Commission has already determined that “this specific combination of factors
21 presumptively establishes good cause for retroactive waiver of the rule.”²²

22 Indeed, “good cause” for granting a waiver clearly exists in this case, given the fact
23 that the allegedly unlawful fax contained opt-out language at the bottom of the page which
24 included a toll-free telephone number that would allow Perry (or any recipient) to opt out of

25 ¹⁶ 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(i)-(ii).

26 ¹⁷ *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

27 ¹⁸ *See Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

28 ¹⁹ Order, ¶¶26-27.

²⁰ *Id.* at ¶ 24.

²¹ *Id.* at ¶ 26.

²² *Id.*

1 receiving future faxes. Further, the 9/15/14 Fax was not only solicited, but welcomed, as
2 Perry responded to the fax by purchasing the software update discussed therein. Finally,
3 AZCOMP is a small business. If AZCOMP's Petition for a waiver is denied, and if Perry is
4 permitted to proceed with a class action lawsuit against AZCOMP based solely upon a
5 partially deficient opt-out provision, AZCOMP will be forced to shut its doors and file
6 bankruptcy. As many courts are beginning to recognize, the TCPA was not designed to
7 impose crushing damage awards on small businesses and to put small companies like
8 AZCOMP out of business so that Plaintiffs' attorneys can be disproportionately benefitted.
9 The facts of this case are particularly illustrative of how the TCPA can be improperly
10 wielded as a weapon for no reason other than pure monetary gain – not to the entities that
11 received the fax, but rather, to their attorneys.

12 Under the Commission's own guidelines, the grant of a waiver under these
13 circumstances would also best serve the public interest.²³ Here, granting AZCOMP a waiver
14 would not undermine the policy objective of the TCPA, which is "to allow consumers to stop
15 unwanted faxes."²⁴ Unlike the indiscriminate "fax blasters" for whom the TCPA is intended,
16 AZCOMP did not send faxes to the general public, but rather, to a limited, very select group
17 of recipients – existing customers who had recently purchased products from AZCOMP,
18 who had communicated with AZCOMP by facsimile, and who had given consent to receive
19 information from AZCOMP via fax.²⁵ AZCOMP has every incentive not to send unwanted
20 faxes to existing or potential customers – for fear of offending (and losing) them. In fact, it is
21 AZCOMP's practice to make sure that any customers or others who do not wish to be
22 contacted do not receive AZCOMP's faxes or other communications. That's precisely why
23 AZCOMP included an opt-out notice in the first place – even in fax communications to
24 existing customers who had given consent to receive those faxes. Finally, after being made
25 aware of the Order (by virtue of being sued in the Lawsuit), AZCOMP immediately took

26 ²³ See Order, ¶ 27.

27 ²⁴ See Junk Fax Order, ¶ 48.

28 ²⁵ AZCOMP believes that the 9/15/14 Fax was sent with permission – a belief that was confirmed by subsequent conversations with Perry's Office Manager and by the fact that Perry ordered the software update featured in the 9/15/14 Fax. AZCOMP's investigation into Perry's allegations is ongoing.

1 steps to ensure that all of its fax communications contain the exact same opt-out notice as
2 that required by the Regulation.

3 Absent a waiver, AZCOMP and other small companies like it will be subjected to
4 substantial expense, significant monetary damages and potential ruination for failing to
5 comply with a rule that the Commission has already determined was the subject of great
6 confusion. By granting a retroactive waiver, the Commission can ensure that the confusion
7 generated by the Junk Fax Order does not expose AZCOMP and others to potentially
8 devastating liability. If the intent of the TCPA was to prevent unwanted faxes – not to fatten
9 the wallets of plaintiffs’ lawyers – that intent would not be met by denying a waiver here or
10 by allowing Perry to proceed with the Lawsuit based upon an allegation that AZCOMP’s
11 opt-out language wasn’t quite good enough.

12 **III. CONCLUSION**

13 AZCOMP is similarly situated to the many others who received a waiver by virtue of
14 the Order. Unfortunately, AZCOMP did not learn of the existence of the Order, or of the
15 opportunity to seek a retroactive waiver, or of the April 30, 2015 deadline, until it was sued
16 by Perry in November. Upon learning of the Order, and upon learning of the Commission’s
17 invitation, to similarly situated parties, to apply for retroactive relief, it filed this Petition. It
18 did not delay. Under such circumstances, AZCOMP is precisely the type of company that
19 should be awarded retroactive relief. The rules of fairness demand it.

20 For the reasons stated above, AZCOMP respectfully requests that the Commission
21 grant AZCOMP a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited
22 fax sent by or on behalf of AZCOMP after the effective date of the Regulation and prior to
23 the date of this Petition.

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1 RESPECTFULLY SUBMITTED this 4th day of December, 2015.

2 **COPPERSMITH BROCKELMAN PLC**

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